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No. 89-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ARTHUR LISTER,

Petitioner,

v.

H. ALLAN STARK, JAMES NUGENT,
SUN ELECTRIC CORPORATION
and SUN ELECTRIC PENSION TRUST,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARTHUR T. SUSMAN
Counsel of Record
TERRENCE BUEHLER
SUSMAN, SAUNDERS & BUEHLER
Two First National Plaza
Suite 620
Chicago, Illinois 60603
(312) 346-3466

JOSEPH S. BUEHLER
FRANKS & FILLER
19333 East Grant Highway
P.O. Box 5
Marengo, Illinois 60152
(815) 923-2107

Attorneys for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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PETITIONER'S QUESTION WAS RAISED AND DECIDED BELOW—IT WAS CENTRAL TO THE DECISIONS BY BOTH THE DISTRICT COURT AND THE SEVENTH CIRCUIT COURT OF APPEALS.

The issue raised by Arthur Lister's Petition for Certiorari to this Court is simple and straightforward. In 1971, Lister was induced to return to work for the Sun Electric Corporation ("Sun Electric" or the "Company") because he was promised service credit for the six years

he had worked for the Company previously. When he retired eleven years later, the Company refused to honor this promise. The district court and the circuit court dismissed Lister's suit, holding that ERISA preempted his claims for fraud and breach of contract. In his petition for certiorari, Lister seeks to have this Court review the decision by the Seventh Circuit Court of Appeals dismissing his state law claims on the ground that ERISA preempts those claims, even though he was not a member of the Sun Electric Pension Plan at the time the promises were made to him.

Respondents' principal argument in opposing the Petition is that Lister failed to present this issue in the court below. This contention is just plain wrong. The central issue in this case and the basis for this petition for writ of certiorari is the fact that the unfulfilled promises were made to Lister before he was a member of the Sun Electric Pension Plan.

In Paragraph 9 of the Complaint, Lister laid the predicate for his claim as follows:

> "9. As an inducement to return to the employ of Sun Electric, plaintiff was promised by the Company that, with respect to employment benefits, he would receive credit for uninterrupted service with the Company beginning in 1964. He was also promised that he would not be treated as a new employee upon his return to the Company in 1971."

Consistent with this, in the brief filed in opposition to defendants' motion to dismiss in the district court, Lister set forth his position as follows:

> "Mr. Lister does not challenge the terms of his pension plan and does not question its benefits administration. His suit will have no impact on the Congressional purposes or policies set forth in ERISA. He

> seeks damages from the Company for its refusal to honor its promise to him to credit him with uninterrupted service covering his first years of employment with the Company."

Similarly, in the court of appeals, Lister summarized his position as follows:

> "First, plaintiff's claims are not preempted because they do not challenge either the terms of the pension plan or its administration, *i.e.*, plaintiff's claims are not related to a retirement plan. Lister simply seeks damages from Sun Electric for the service credit he was promised but did not receive. While the damages sought by him are based on a longer period of employment and calculated according to the terms of the pension plan, the damages were occasioned by Sun Electric's wrongful conduct, and recovery will be from the Company, *not* the Plan."

Throughout these proceedings, defendants have chosen to ignore the fact that Lister's claims are based on promises made before he was a member of the Plan. Lister brought this to the attention of the Seventh Circuit in his reply brief as follows:

> "Throughout its responding brief, the Company characterizes Lister's claim as a challenge to his benefit calculation by plan fiduciaries. In so doing, the Company purposefully ignores the essential nature and character of Lister's claims. Lister seeks to enforce against the Company a promise made to him by the Company when he was not yet a plan participant. It was the Company that caused Lister's injury and, therefore, is liable for damages, to be measured by the benefit formula in the plan documents. To eliminate any ambiguity in the Complaint that this lawsuit is against the Company, Lister stated his intention to amend his complaint by dropping the pension trust defendants after this action is remanded to Illinois state court."

This point was reiterated in the argument section of the Reply Brief:

> "Having characterized Lister's claim as one brought against plan fiduciaries for a recalculation of benefits and noting that ERISA's pre-emption is broad, the Company then moves easily to the conclusion that the claim must be pre-empted because it "relates to" a benefits plan. (Resp. Br. pp. 4-8). Stating the problem this way ends the inquiry. The issue properly stated is: does Lister's claim for damages against the Company based on a promise made to him before he was a plan participant "relate to" the terms or administration of the benefits plan. If Lister prevails, his damages will be computed by reference to the plan's formula, but the damages will be paid by the Company, not the plan."
>
> * * *
>
> "The Company has failed to explain why Lister's claim against the Company for damages based on the Company's refusal to honor its promise to Lister, who was not a plan participant at the time, "relates to" the plan in any meaningful way."

Lister's claims are based on the fact that certain promises were made to him *before* he was a member of the Plan. Thus, the issue raised by Lister's petition for a writ of certiorari was precisely the issue raised and decided by the lower courts. The issue has, therefore, been properly raised and preserved for review by this Court.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

ARTHUR T. SUSMAN
Counsel of Record
TERRENCE BUEHLER
SUSMAN, SAUNDERS & BUEHLER
Two First National Plaza
Suite 620
Chicago, Illinois 60603
(312) 346-3466

JOSEPH S. BUEHLER
FRANKS & FILLER
19333 East Grant Highway
P.O. Box 5
Marengo, Illinois 60152
(815) 923-2107

Attorneys for Petitioner

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